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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 221 MISC.
222 MISC.

PEOPLE ex rel. TONY MARINO,
Petitioner,

vs.

JOSEPH E. RAGEN, Warden, etc.,
Respondent.

and

TONY MARINO,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

PETITION

WM. SCOTT STEWART,
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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. _____

MARINO,

Petitioner,

vs.

ILLINOIS,

Respondent.

PETITION.

TO THE HONORABLE FRED VINSON,
Chief Justice of the United States, and
Associate Justices of the Supreme Court
of the United States

A.

Summary Statement of Matter Involved.

Since the reversal in *Marino* v. *Ragen,* 332 U. S. 561 there has been another hearing in the trial court. The writ has again been quashed and your petitioner has been remanded. The Supreme Court of Illinois has denied relief. Your petitioner, Tony Marino, is being held on the original life sentence, inflicted in 1925 for murder. He continues to claim that his sentence was the result of an unfair hearing,

in which he was deprived of fundamental rights, guaranteed by the Fourteenth Amendment.

When the case was called before Judge Dusher, pursuant to the mandate, the Attorney General of Illinois submitted a prepared statement, R. 3 Abst. 2, as follows, and moved for the discharge of petitioner:

> "I have already stated my position in this case in the Supreme Court of the United States and in this court. That position is that the facts established on the first hearing of this cause demonstrated that the petitioner was convicted without having intelligently waived counsel and was therefore imprisoned without due process of law. The Supreme Court of the United States has so declared * * *"

The court then appointed the local State's Attorney as amicus curiae. Petitioner moved, without success, for a change of venue, alleging prejudice, based partly upon the fact that the judge had procured affidavits for submission in 332 U. S. 561.

The trial court, after overruling a motion made by petitioner for discharge, continued the matter for trial. Whereupon the Attorney General applied to this Court for instructions. Judge Dusher also filed suggestions here. The Attorney General filed a reply. The conflicting views of the trial judge, and the former Attorney General are set out, in printed form, in 332 U. S. 561, No. 93, 1947. It will be observed that Judge Dusher reported to your Honors that the issues were different in the first trial than those represented in the confession of error. The judge suggested to this court that his decision, in the first trial, was that he had no jurisdiction by way of habeas corpus. In reply the Attorney General copied part of the judgment entered by Judge Dusher, i.e.

> "The Court finds that the matters complained of in the petition aforesaid are not well taken and there is

no sufficient cause shown why the said Tony Marino should not be held in custody * * *."

The Attorney General, p. 2, maintained that Judge Dusher had in fact entertained the petition and had explicitly decided the substantive question of federal due process.

This Court denied the motion of the Attorney General to clarify the mandate, 332 U. S. 852.

Judge Dusher then held a second trial in the habeas corpus case. As will be observed from the comments of the judge, shown in the certificate of evidence, the judge construed the order entered here, 332 U. S. 852, denying the motion of the Attorney General for instructions, to mean that he, Judge Dusher, had a right to again try the facts.

The judge said in his suggestions, p. 4, filed in 332 U. S. 561:

> "Since the decision of this court on the writ of certiorari, facts which contradict the record as submitted to this court by the Attorney General have come to my attention. These facts, in my opinion, demonstrate that a full hearing should be had as to just what transpired at the time the petitioner pleaded guilty and was sentenced in 1925 by the Circuit Court of Winnebago County. In order that this Court may be advised concerning these facts I am submitting herewith several affidavits."

The trial judge said at the commencement of the second hearing, R. 8:

> "I am going to proceed as though it was a brand new hearing on remandment from the Supreme Court of the United States and it is only because of that opinion that this court has any power to inquire into what the actual facts were."

As appears from the above, and other comments made by the trial judge, Judge Dusher adhered to the position,

which he said he had taken in the first hearing, i.e. that the Circuit Court really had no jurisdiction by way of habeas corpus—but that since your Honors had declared that habeas corpus was an appropriate remedy, Judge Dusher intended to follow the mandate, which required that he assume jurisdiction at the command of this Court.

The position taken by the Attorney General, and also by counsel for Marino* was that Judge Dusher had in fact assumed jurisdiction in the first hearing. Petitioner contended, and still maintains, that the conclusions, of the trial court, as to the law applicable to the facts shown, were in error.

Judge Dusher erroneously assumed that he had a right to apply the law, as he understood it, to the facts, as he found them to be, and to determine all over again whether or not Marino had been afforded due process. The judge finally concluded that no rights were violated. The Supreme Court of Illinois approved of this finding and held that it was properly based upon conclusive evidence. The Illinois courts did not consider themselves bound by the contrary adjudication in 332 U. S. 561.

Judge Dusher stated, during the second trial, that he would look to see if the Attorney General was warranted in making a confession of error in 332 U. S. 561. We copy from the printed motion of the Attorney General, p. 4 in No. 93, 332 U. S. 561, where the motion of the People for the discharge of Marino is set out.

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* Mr. Rosario A. Gaziano was appointed and appeared in both habeas corpus hearings. Since that time, Mr. Gaziano has become an Assistant State's Attorney. This necessitated withdrawal. Mr. Gaziano contributed his services without fee. As appears from his pauper affidavit Marino has no way of paying counsel.

"In denying the Attorney General's motion (to discharge Marino) Judge Dusher said, *inter alia*:

> '* * * I don't believe the law enforcement officers of the State of Illinois are quite as black as Mr. Rutledge painted them; neither do I think the law of Illinois is as bad as painted. The legislature had seen fit to establish a Board of Pardons and Paroles and if Marino has been punished more than he should have been, that is up to the Board of Pardons and Paroles, but this Court is required to follow the law as stated in the acts of the legislature and the decisions of the Supreme Court of Illinois, and in the light of the mandate from the United States Supreme Court I think it is proper that this Court inquire into the entire matter and determine whether or not the Attorney General properly confessed error before the United States Supreme Court.'"

After Judge Dusher remanded the prisoner, for the second time, we sought review in the Illinois Supreme Court by four separate methods. Our motion to consolidate was denied. (1) We sought to mandamus Judge Dusher in order to compel the trial court to discharge the prisoner, to comply with the mandate of this court. No. 30855. (2) We petitioned for certiorari, also seeking compliance with the mandate No. 30856. Leave to file these petitions was denied upon presentation. The respondent was not required to answer, or to make any defense. The Illinois Supreme Court took jurisdiction of the other two actions, i.e., (3) An original petition for habeas corpus, No. 30854, and (4), a writ of error, No. 30804. The writ of error required a review of the original murder conviction.

Relief has been denied by the Illinois Supreme Court in both cases. The writ of habeas corpus issued by the Illinois Supreme Court, was quashed, and the original judgment in the murder case has been affirmed. We now seek, by certiorari, to bring here the last mentioned cases.

If the practice in this court requires two separate petitions, we beg the indulgence of the Court. We trust that Your Honors will accept one like the other in each case. We are sending two originals to the Clerk. If we are required to start with two cases, please consider this as a motion to consolidate. We also apply for leave to proceed *in forma pauperis*. In order to save time, we ask that the printing of the record be dispensed with, if Your Honors see fit. The Attorney General has copies of all the matters here submitted.

Judge Dusher certified a transcript of the evidence and proceedings, relative to the second hearing of the habeas corpus. Petitioner introduced a stenographic report of the evidence heard in the first habeas corpus hearing into the second trial, R. 241 to 257 Abst. 12 to 15, in order to help support his contention that Judge Dusher had no right to permit the introduction of further evidence to contradict the findings previously made here, in 332 U. S. 561. Also, there is shown, R. 61 Abst. 5, a stenographic report and the record of the murder case. This certificate of evidence was before the Illinois Supreme Court.

It will be noticed, from the opinions rendered, that the Illinois Supreme Court made reference to the evidence so preserved. It was held, by the Illinois Supreme Court, that the evidence introduced in the second hearing of the habeas corpus case shows conclusively that Marino, at the time of his murder conviction, had been afforded a fair trial. Further, that he had not been denied any of his constitutional rights. We have withdrawn the original of this certificate and present same here. We printed an abstract of the evidence produced in these habeas corpus proceedings, for use in the Illinois Supreme Court. This abstract has been incorporated in the record, No. 30854.

The record in the original murder case is a transcript

of the common law record. This, too, was printed in abstract form, for the use of the Illinois Supreme Court, and is also incorporated in the record. No. 30804.

Immediately after Judge Dusher decided against petitioner, in the second trial of the habeas corpus proceeding, we filed a petition here for certiorari, Misc. 30. We sought a direct review of Judge Dusher, on the possibility that the trial court might have proved to be the court of last resort. We asked the Clerk of this Court to hold our petition and to not present it, for the reason that we then had pending our various petitions in the Illinois Supreme Court. This proved to be a mistake on our part. We adopted this method in order that the time would not expire in which to ask for a direct review of the decision of Judge Dusher. Yet we did not wish to ask Your Honors to rule upon the findings made by Judge Dusher until the Illinois Supreme Court had acted. When we filed our petition here, in Misc. 30, it was still within the power of the Illinois Supreme Court to declare that it was without jurisdiction. In such case it would follow that Judge Dusher presided over our court of last resort. We feared that such finding would leave us with Misc. 30 as our only remedy. Our original plan was to request the Clerk of this Court to hold the first petition, Misc. 30, here until the Illinois Supreme Court had decided. Then we intended to move to dismiss the petition in Misc. 30, if we prevailed in the Illinois Supreme Court.

On the other hand, in the event of adverse decisions in the Supreme Court of Illinois, we intended to request that it be presented, with a petition such as this. Our method proved to be unworkable. The Illinois Supreme Court passed our cases—and held them upon the advisement docket, from term to term,—after they had been submitted. Apparently the Supreme Court of Illinois was unwilling

to decide our cases, in advance of a decision by Your Honors, in Misc. 30. We were compelled, eventually, to ask the Clerk of this Court to present our petition in Misc. 30. The Illinois Supreme Court continued to hold up its decision, until Your Honors disposed of Misc. 30. After denial of our petition in Misc. 30, (336 U. S. 969, rehearing denied, 337 U. S. 921.), the Illinois Supreme Court decided the cases at bar. All of this has taken over a year.

Now it appears, from the opinions rendered in the cases at bar, that the Illinois Supreme Court has regarded denial of certiorari here, in Misc. 30, as the judgment of this court that Judge Dusher was correct. That is—that there was no error, after the second trial in remanding Marino to the penitentiary.

A conflict has arisen in the state courts over the meaning of the reversal in 332 U. S. 561, and also over the effect of the denial of certiorari in Misc. 30. We now seek to bring that conflict to Your Honors.

No Plea of Record.

The Illinois courts have repeatedly held that a judgment is void without a plea of record. The defect is jurisdictional. Practice under the statutes has thrown procedural safeguards about the formal entry of a plea of guilty. Marino never entered a plea of any kind. Your Honors so found in 332 U. S. 561. We copy from the confession of error.

> "No plea of guilty ever appears to have been entered before the trial court in petitioner's trial and it appears that the waiver on record purportedly signed by the petitioner was, in fact not signed by him."

Yet, upon the second trial of the habeas corpus, Judge Dusher found that Marino had pleaded guilty and further, that the plea was properly shown by the record. The judge

did this upon evidence before him in the first hearing, which evidence the judge properly refused to consider in the first trial. The reason given by Judge Dusher, for his change in this ruling, was that, subsequent to the decision in 332 U. S. 561, the Illinois Supreme Court had changed the law. When we complained to the Illinois Supreme Court of this illegal reversal on the part of Judge Dusher, the Illinois Supreme Court refused to consider the point. The Illinois Supreme Court held that Your Honors had decided against our point in Misc. 30.

The Right of Counsel.

Your Honors found in 332 U. S. 561, from the record, and pursuant to the confession of error, that Marino was without counsel at the murder trial. This fact remained the same at the second hearing, but Judge Dusher allowed a lawyer to give new testimony to the effect that he saw Marino in the jail before Marino was indicted. It appears that some friends talked of engaging the lawyer, but withdrew their aid before the trial. The lawyer said he returned part of retainer. It is undisputed that the lawyer never appeared in Court. Judge Dusher concluded that Marino had had advice. Judge Dusher said, R. 278:

> "The actual appearance in court with a lawyer is in a large measure a formality after the lawyer has advised the defendant concerning his rights."

The judge would not allow in evidence any conversation between Marino and the lawyer on the ground that it was privileged. Judge Dusher filed an affidavit made by the lawyer, p. 10, in support of his suggestions in 332 U. S. 561.

In his printed reply, to the suggestions made here by Judge Dusher in 332 U. S. 561, the Attorney General

contended that Judge Dusher had no right to submit a privileged communication, in the form of an affidavit, from the lawyer. Also an argument was made, intended to reflect upon the credibility of the lawyer. The lawyer stated in his affidavit here that

> "My advice and instructions covered every phase pertaining to his rights in court under said charge."

The judge, in his opinion R. 276, stated that the court assumed that the lawyer told Marino of his constitutional rights. No explanation was offered as to why the lawyer did not testify in the first trial. Unless it be found in the cross-examination, R. 137 Abst. 6. The lawyer said that he had no memory of the case when asked about it at first. Marino testified, in both trials, that he was held incommunicado and that no lawyer ever saw him from the time of his arrest until years after his sentence.

The record shows, and Your Honors found, that Torrisi, the policeman, acted as interpreter, along with one Joe Marino. Torrisi testified, R. 253, Abst. 14, in the first trial, that one Corrado, since deceased, explained the consequences of pleading guilty. No mention was made in the testimony of Joe Marino, the uncle of Tony Marino, in the first trial. In the second trial, Torrisi testified, R. 154 Abst. 8, that he, Torrisi, did not act as interpreter. In the second trial Torrisi interjected the uncle, as having been present to interpret and explain things. Petitioner proved, in rebuttal, R. 263, Abst. 15, that the uncle was not present, and further that the uncle was also unable to speak English. Joe Marino could not read or write. It will be learned from the certificate, R. 278, that Judge Dusher said:

> "* * * in my opinion he knew absolutely all his rights and he did exactly what he said he wanted to do—he wanted to plead guilty and put himself on the mercy of the Court and I think he understood and comprehended just exactly what he did."

It is contended that the question was not open, after Your Honors had decided, in 332 U. S. 561, that Marino was without understanding and did not have the help of counsel. The Illinois Supreme Court should have examined into the question, first to see if Judge Dusher violated the mandate, and, second, if the Illinois Supreme Court determined that the question was open, it should have decided whether or not Judge Dusher was warranted in his new finding. We say that the question was not open, and if it were, the so-called new evidence should not have altered the main facts.

The Grand Jury.

The indictment, consisting of four counts, is shown at pp. 26-34 of the certificate.

The record, in No. 30804, shows that the sheriff presented eight names, R. 2, Abst. 2. It does not say that he summoned eight or that the court duly filled the panel. There is no expression in the record from which it might be inferred that the sheriff made any attempt to comply with the statute. The sheriff was not even directed to secure those qualified. It was "ordered that the sheriff call eight men." R. 2, Abst. 2. The eight men may have been non-residents, aliens or any persons lacking the qualifications of jurors.

If it be determined that these eight were strangers or unauthorized persons, we have left only 15 qualified grand jurors. The statute requires 16, so we contend that the indictment has been returned by an illegal body. It is void. The Illinois Supreme Court ruled that, in the absence of a motion to quash, it would be presumed that the proceedings were regular.

B.

Basis of Court's Jurisdiction.

This court may, by certiorari, have these causes certified to it for determination by virtue of 28 U.S.C. Chapter 81, Section 1257, Section 344, Judicial Code, Section 237, as supplemented by the rules of this court, 38, 43.

C.

Questions Presented.

1. This case presents the questions, first, whether judgments entered, under a mandate from this Court, in *Marino* v. *Ragen*, 322 U. S. 561, are in accordance therewith, and second, whether they violate due process, as guaranteed by the Fourteenth Amendment.

2. After the Attorney General of the State has confessed error in this Court, and this Court has accepted the conceded facts as true, and this Court has found sufficient facts upon which to base a conclusion here, that a convict, held under a State judgment, had been deprived of due process, as guaranteed by the Fourteenth Amendment, is it proper for the trial court, upon remand, to examine into the propriety of the action of the Attorney General, and to rule, after a new trial, that the facts were not such as confessed and found here, and further that the law, as applied to the facts newly found, was contrary to the decision previously made here?

3. After these questions have been presented to the Supreme Court of the State, and it appears that the action of the trial judge has there been upheld, should this Court bring the entire proceeding here to determine if the mandate of this court has been obeyed?

D.

Reasons for Granting Writ.

The Supreme Court of Illinois has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings.

The Supreme Court of Illinois has decided federal questions in a way which conflicts with the decisions of this court, particularly the judgment of this court on a previous review of the case at bar.

Regardless of whether Your Honors accept the facts as found in 332 U. S. 561, or adopt the alleged facts found in the new trial, it will be seen that certain vital facts remain unchanged, i.e., a youthful uneducated immigrant, unable to speak English, or to read or write, was taken into court on a capital charge, and without a lawyer, and with no help, and with no trial, was sentenced to life imprisonment. His need for counsel must have been known to the court, his right to counsel was not explained to him, and he had no understanding of court proceeding. He was unable intelligently to waive counsel, and counsel was not offered him.

When this Court reversed the first judgment, it was the duty of Judge Dusher to follow the law as laid down by this Court, and to accept the facts as adjudicated here. Having failed in this, it became the duty of the Supreme Court of Illinois to reverse Judge Dusher, and to compel compliance with the mandate. This having been refused, it is the duty of this court to reverse the Illinois Supreme Court.

When the record of the trial court was presented to the Illinois Supreme Court, and error was claimed, that court took jurisdiction, by issuing a writ of habeas corpus, and

also by entertaining a writ of error. After considering the matter, the Illinois Supreme Court erred in the denial of relief. The indictment was void, having been returned by an illegal grand jury. The trial court lacked jurisdiction for want of a plea and the Supreme Court of Illinois erred, and denied equal protection of the laws, when it refused to reverse.

Prayer.

Your petitioner files the records here and prays for leave to sue *in forma pauperis*, that the writ of certiorari issue, in the usual form, and that the judgments be reversed. Your petitioner requests such further relief as may seem just.

TONY MARINO,
Petitioner.

WM. SCOTT STEWART,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. .....

MARINO,

Petitioner,

vs.

ILLINOIS,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinions rendered by the Illinois Supreme Court are in the record. They are reported *People ex rel. Marino* v. *Ragen,* 404 Ill. 35 and *People* v. *Marino,* 404 Ill. 37. We present two opinions, one in No. 30854, by Mr. Justice Fulton, in the habeas corpus case, and one in No. 30804, by Mr. Justice Wilson in the original murder case. Judge Dusher rendered an opinion at the conclusion of the second trial of the habeas corpus case in Winnebago County. R. 272. This opinion has not been printed, abstracted, or reported.

II.

Jurisdiction.

The judgments to be reviewed were entered September 22, 1949, Your Honors have jurisdiction by virtue of 28 U.S.C. Chapter 81, Section 1257. Section 344 Judicial Code, Section 237, as supplemented by the rules of this Court, 38, 43. The claim of petitioner that he has been deprived of due process as guaranteed by the Fourteenth Amendment, has been repeatedly presented and expressly determined. All of the State Court decisions have been against this right. If it clearly appears from the opinion of the State Court that a federal question was assumed to be in issue, etc. this court has jurisdiction. *Montana ex rel. Haire* v. *Rice,* 204 U. S. 291. Under the former practice, it was held, in *In re Blake,* 175 U. S. 114, that, in respect of dealing with state tribunals, a writ of error is the proper remedy, where a case has been decided here on a former proceeding. We submit that certiorari is proper, now, since the abolishment of the writ of error. After a case has been decided upon its merits, and remanded, as here in 332 U. S. 461, and it is again brought here, it is too late to allege lack of jurisdiction. *Washington Bridge Co.* v. *Stewart,* 3 How. 413, *Maguire* v. *Tyler,* 84 U. S. 282. *The Santa Maria,* 10 Wheat 443, *The Lady Pike,* 96 U. S. 461; *United States Trust Co.* v. *New Mexico,* 183 U. S. 535; *United States* v. *Camou,* 184 U. S. 572, 574; *Dillworth* v. *Curtis,* 139 Ill. 508. Since *Frank* v. *Mangam,* 237 U. S. 309, 331, this court has recognized that habeas corpus in the federal courts, by one convicted of a criminal offense, is a proper procedure to safeguard liberty, even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. *Hawk* v. *Olson,* 326 U. S. 271, 274. The time, ninety days, in which to apply for certiorari is fixed

by Title 28 Sec. 2101 (c). Notice of filing this petition is provided for in Rule 38, Title 28, Chapter 131. Rule 38½ also fixes the time for application for certiorari in a criminal case. Priority of criminal cases on review from state courts is given by Title 28 Sec. 2102. The power of the Supreme Court to reverse, direct the entry of appropriate judgment, or require further proceedings, is given by Title 28 Sec. 2106. The power to issue all writs necessary is given by Title 28 Sec. 1651.

III.

Specification of Errors.

The Supreme Court of Illinois erred in permitting the trial court to decide questions contrary to findings made here. The Supreme Court of Illinois has erred in the denial of rights guaranteed by the Fourteenth Amendment. The original judgment should have been reversed. In the habeas corpus case, the Supreme Court of Illinois erred in quashing the writ. It had been previously adjudicated here in 332 U. S. 561, as a matter of law and of fact, that Marino had been deprived of his rights in the murder conviction. Your Honors had found that the original judgment was in violation of due process, as guaranteed by the Fourteenth Amendment. At the suggestion of the Attorney General, Your Honors had found that habeas corpus was the appropriate remedy. The Illinois Supreme Court, having assumed jurisdiction by issuance of the writ, should have ordered the discharge of Marino.

The Supreme Court of Illinois erred when it declined to examine the mandate, the opinion of this Court, and all of the proceedings, to determine if the trial court had obeyed the mandate. The Supreme Court of Illinois, having assumed jurisdiction, and being in possession of the neces-

sary supervisory power, erred in refusing to reverse the trial court. The Supreme Court of Illinois erred in holding that denial of certiorari here amounted to an affirmance of the trial court, and that the claim of lack of due process had been decided against petitioner.

The Supreme Court of Illinois erred in holding that the facts and the law, as found by the trial court in the second habeas corpus trial, had been adjudicated here and that petitioner had not been denied due process of law, as guaranteed by the Fourteenth Amendment.

The Supreme Court of Illinois erred in not holding that the indictment was void, having been returned by an illegal grand jury, and in not holding that the trial court was without jurisdiction for lack of a plea. The judgment of the Supreme Court of Illinois constitutes a denial of the equal protection of the laws.

BRIEF.

I.

The facts were established in *Marino* v. *Ragen*, 332 U.S. 561 and, after this court concluded upon those facts that due process, as guaranteed by the Fourteenth Amendment, had been denied, the matter was no longer open for the State Courts to find new or different facts, or to arrive at a different conclusion as to the law. No question, once considered and decided by this Court, can be re-examined at any subsequent proceeding of the same case.

Clark v. *Keith*, 106 U.S. 464.

Chaffin v. *Taylor*, 116 U.S. 567.

Summary of Argument.

This Court may examine the opinions below to ascertain the ground of judgment. (p. 21)

The Illinois Supreme Court misapprehended the effect to be given to the denial of certiorari in Misc. 30, when we sought a direct review of the second hearing of the habeas corpus. (p. 22)

The Supreme Court of Illinois misapprehended the mandate. (p. 23)

Facts not shown by the common law record and established here were presented to the Illinois Supreme Court and that Court erred in not considering that they had been adjudicated and that the law had been established here. (p. 26)

There is no plea of record. Such fact had been adjudicated here. The Supreme Court of Illinois erred in not reversing a contrary finding by the trial court. (p. 27)

The Supreme Court of Illinois erred in not regarding the murder judgment in combination with the habeas corpus case and in not ruling that both judgments fell when this Court decided 332 U.S. 561. (p. 30)

It was not within the power of the trial court to change the record submitted here in 332 U.S. 561 and the Supreme Court of Illinois erred in refusing to so hold. (p. 31)

The Illinois Supreme Court erred in refusing to examine the entire record to determine if Judge Dusher had obeyed the mandate. (p. 32)

After this Court had determined that Federal rights had been violated in the matter of the right to counsel, the trial court had no power to find new facts and to arrive at a contrary conclusion on the law. The Supreme Court should have corrected this error. (p. 33)

The new finding by the trial judge, that Marino had had the benefit of counsel and that he understood what he was doing, finds no support in the evidence. The Supreme Court of Illinois erred in not so holding. (p. 35)

The trial court erred in holding that the matter of lack of counsel could not be raised in the absence of a request for counsel after this Court had held that the point was properly raised. The Supreme Court of Illinois erred in not reversing this holding. (p. 39)

The indictment was void, having been returned by an illegal body. The Supreme Court of Illinois denied Marino the equal protection of the laws when it refused to so hold. (p. 42)

ARGUMENT.

Of course, neither state court intended to defy this Court. There have been a number of misapprehensions. No doubt we could rest upon the claim that this Court should compel obedience. That 332 U.S. 561 should be followed, right or wrong. We prefer to maintain that the law has been correctly stated by Your Honors, and further, that a proper application of that law should result in the discharge of Marino. This is so, we contend, whether we accept the facts as found in 332 U.S. 561, or if we go further to scrutinize the new evidence. Even if Judge Dusher had had authority to start all over we contend that a proper judgment would have been to sustain the writ.

The opinions rendered by the Illinois Supreme Court have been recorded as required by statute. Your Honors may examine them to ascertain the ground of the judgments. *Kreiger* v. *Shelby Railroad Co.*, 125 U.S. 39; *Gross* v. *United States Mortgage Co.*, 108 U.S. 477. It is our contention that the state courts have mistaken the import of the mandate in 332 U.S. 561. The mandate has been copied, p. 10, into the printed motion, filed by the Attorney General for instructions, in 332 U.S. 561. It was held in *Martin* v. *Hunter*, 1 Wheat 304, among others, that our point may be reviewed here. It appears that the Illinois Supreme Court has denied relief for the reason that this court, after the second habeas corpus trial, refused to review Judge Dusher. Referring to the second habeas corpus trial, Mr. Justice Wilson said, in No. 30804, 404 Ill. 37, 41:

> "As observed in *People ex rel. Marino* v. *Ragen*, No. 30854 upon the remandment, the Circuit Court

> of Winnebago County heard further testimony and held full and complete hearings in order to determine whether the defendant had been afforded a fair trial at the time of his conviction in 1925, and further whether he had been denied any of his constitutional rights. Based upon conclusive testimony, the Circuit Court rejected the contentions advanced by defendant and quashed the writ of habeas corpus. As recounted the United States Supreme Court denied defendant's petition for a writ of certiorari, and thereafter his petition for a rehearing. Accordingly, the principal contentions made and argued in the present proceedings are not open for a further review."

Mr. Justice Fulton, in No. 30854, after reciting the history of this case, including the denial here of certiorari in Misc. 30, holds as follows, 404 Ill. 35, 37:

> "Exactly the same record presented to the United States Supreme Court has been filed in this case. Nothing to impeach that record and no new or different question has been raised in the pending petition."

From the above quotations Your Honors will perceive that both Illinois Supreme Court Justices misapprehended the meaning of the denial of certiorari here in Misc. 30. We did not apply for a rehearing in the Illinois Supreme Court, because such action on our part would have thrown this case back for final determination until November, January or March.

We submit that the Illinois Supreme Court overlooked the following rule—we quote from 36 C.J.S. Section 277, page 182, citing *House* v. *Mayo*, 324 U.S. 42, *McCrea* v. *Jackson*, 148 F. 2d. 193.

> "*Effect of denying writ.* The denial of a writ of certiorari by the Supreme Court to review the judgment of the State Court imparts no expression on the merits of the case. Affirmance of the judgment is not inferrable from the denial of the writ."

In *Bute* v. *Illinois*, 333 U.S. 640, 668, Your Honors noted that the affirmance of the conviction of Bute conclusively established compliance with Illinois law. The same can not be said of the affirmance in the case at bar. The Supreme Court of Illinois did not consider whether the sentence complied with local law. The mistake made by the Supreme Court of Illinois as to the effect to be given to the denial of certiorari here, in Misc. 30, prevented that Court from ever getting to any determination of local law. In any event, we submit that local law could not control if it were in conflict with 332 U.S. 561.

Mr. Justice Fulton, in the habeas corpus case, No. 30854, 404 Ill. 35, 36, stated that Your Honors had only the common law record, and said Judge Fulton, in the light of the confession of error, this court held that petitioner had been denied due process of law. We believe it would have been more accurate if Judge Fulton had said that Your Honors in 332 U.S. 561 had the petition made by Marino, based upon the facts developed at the first trial of the habeas corpus case before Judge Dusher.

When Mr. Justice Fulton said that Your Honors "passed upon the common law record only," we submit that Judge Fulton was in error. Your Honors had, in addition to the evidence, the confession of error setting up undisputed facts. The confession of error is printed in full in the motion of the Attorney General for instructions in 332 U.S. 561. We quote from the brief filed in the Supreme Court of Illinois by the Attorney General, p. 6, referring to 332 U.S. 561:

> "That opinion was rendered, not upon a review of the naked common law record which is all that is presented in this case, but after a hearing, including the taking of evidence, in the Circuit Court of Winnebago County on a writ of habeas corpus issued by that court."

Your Honors have these opinions in the record and, of course, it will be for Your Honors to say what is to be understood by them. Correct appraisal of the effect to be given here of the opinions of the Illinois Supreme Court will have to be based upon a consideration of the entire proceedings. The original proceedings are before this court, and it is proper that they be examined, in order that Your Honors may decide any controversy which might arise over new points. *Mitchel* v. *United States*, 15 Pet. 52, *The Santa Maria*, 10 Wheat 431.

The misapprehension by the Illinois Supreme Court of the effect of denial of certiorari in Misc. 30 caused that court to refuse to consider our claims. It is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right. *Young* v. *Ragen*, 337 U.S. 235, 238. This Court has the power to probe issues disposed of prior to the one under review. *Urie* v. *Thompson*, 337 U.S. 163, 172.

We submit that there are several things wrong with the position taken by our Supreme Court. We have pointed to two errors on the part of that Court, *i.e.*, believing that Your Honors had only the common law record, when this court decided 332 U.S. 561, and assuming that, by denial of certiorari, Misc. 30, Your Honors affirmed Judge Dusher. We submit that the correct view to have been taken by the Illinois Supreme Court would have been to look upon the denial of certiorari here as a proper regard, on the part of this Honorable Court, for the rights of a sovereign state. We have no doubt that Your Honors did not choose to intervene, while the matter was pending in the Illinois Supreme Court.

It has often been held that the United States Courts ought not to exercise jurisdiction, by a discharge of the

person, in advance of a final determination of his case in the courts of the State, and, even after such final determination will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall,* 117 U.S. 241; *Ex Parte Fonda,* 117 U.S. 516; *In re Frederick,* 149 U.S. 70; *Pepke* v. *Cronan,* 155 U.S. 100; *Bergemann* v. *Backer,* 157 U.S. 655; *Whitten* v. *Tomlinson,* 160 U.S. 231; *Baker* v. *Grice,* 169 U.S. 284. We submit that the Illinois Supreme Court overlooked the fact that Your Honors must have denied certiorari in Misc. 30 because of this rule of practice.

There are many reasons why we did not dare risk allowing the 90 days to expire before filing our petition, Misc. 30, for direct review of Judge Dusher. We were compelled to exhaust all remedies. *Ex parte Hawk,* 321 U.S. 114, 116. *Parker* v. *Illinois,* 332 U.S. 571. We submit that a proper interpretation of the order, denying the motion of the Attorney General for instructions, 332 U.S. 852, would have been that Your Honors naturally expected Judge Dusher to abide by the judgment of this court in 332 U.S. 561, without further instructions. We conclude that Your Honors refused to answer the Attorney General for the reason that there would be time enough for this Court to act further in the event Judge Dusher failed to obey the mandate. Also that Your Honors did not choose to act further until after the matter had been presented to the Illinois Supreme Court. We assume that Your Honors perceived the danger of a new practice, if Your Honors furnished further instructions with the mandate. A flood of such motions would result.

The mistake made by Judge Dusher, as we see it, that Judge Dusher seemed to believe that the action of this Court, in denying the motion of the Attorney General for instructions, meant that Judge Dusher should hold a trial

de novo. Judge Dusher reported to Your Honors that he had remanded Marino for lack of jurisdiction. If that had been the understanding of this Court, when 332 U.S. 561, was decided, Your Honors would have denied certiorari. The record, on the fact that Judge Dusher assumed jurisdiction in the first hearing, will prevail over any subsequent statement of the trial judge. *Fayweather* v. *Rich,* 195 U.S. 276. Regardless of what Judge Dusher may have intended, the record shows that he took jurisdiction of the federal question. That decision, to take jurisdiction, was not reviewable here. When the Attorney General confessed error and represented to this Court that Marino had chosen the proper remedy, Your Honors found in 332 U.S. 561 that the trial court had jurisdiction and that this Court also had jurisdiction. After such adjudication it was too late for Judge Dusher to assert the contrary. When the trial Judge brought about a substitution of attorneys for the People, by appointing the local prosecutor as a friend of the Court, that official should not have been heard to litigate anew questions determined on the appeal. *French* v. *Gapen,* 105 U.S. 509. This Court said in *United States* v. *Camou,* 184 U.S. 572, 574 that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances for changes in its members."

In *Carter* v. *Illinois,* 329 U.S. 173, 178, Your Honors followed the Illinois Supreme Court, in restricting review to the common law record, stating that it would be time enough to consider facts, not shown by the common law record, when the issue was properly before this Court, after having been presented in the state courts. Here we present such a case. Facts found to exist, and not shown by the common law record, were properly before Your Honors in 332 U.S. 561. These facts have been presented to the state courts.

No Plea of Record.

If Your Honors had not found in 332 U.S. 561 that there had been no plea, and the common law record had shown the entry of a plea of guilty, we feel certain that Your Honors would have nullified the entry by a further finding that the plea had not been made with understanding. Cf. *Von Moltke* v. *Gillies,* 332 U.S. 708. When Judge Dusher changed the finding and made a new one, this was merely a preliminary step to further new findings made by the trial court. It was an important step for two reasons. First, the defect should have caused reversal in 30804, when a question of fact essential to the judgment is actually litigated and determined in the first proceeding, the parties are bound by that determination in a subsequent proceeding, even though the cause of action is different *Commissoiner* v. *Sunnen,* 333 U.S. 591, 601, making reference to Von Moschzisker, "Res Judicata", 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48, 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1. Second, Judge Dusher had decided to the opposite, upon the same evidence previously submitted to him on this issue.

When Judge Dusher made a new finding on the absence of counsel, the trial court had new evidence, to the effect that a lawyer said he had called upon Marino in the jail. When Judge Dusher made a new finding on the waiver of the right to counsel, the trial court had new evidence, in the way of additions furnished by the policeman to his former testimony.

But when Judge Dusher found that the record shows a plea, the trial court did that on nothing that it did not have in the first trial. In the first trial, Judge Dusher had the conflicting oral testimony from Marino R. 244,

Abst. 12 and Torrisi R. 256, Abst. 14 on the subject. But the court correctly ruled that oral testimony could not overrule the record. In the second trial the judge had the same conflict, between Marino R. 39, Abst. 3 and Torrisi R. 151, Abst. 8. The former States Attorney added his testimony R. 174, Abst. 10. No explanation was offered as to why the former States Attorney did not contradict Marino in the first trial, although he was active in seeking evidence that Marino had counsel, R. 137, Abst. 6. The Attorney General confessed error with a full knowledge of the record, as it existed then, and as it now appears. So we say that Judge Dusher made a new finding contrary to that made by Your Honors, on the very same facts submitted to this court and shown in both hearings.

In the first trial of the habeas corpus case, Judge Dusher correctly refused to allow the prosecution to supplement the record from the notes made by the trial judge in the original murder case. Nor would Judge Dusher allow the record to be amplified by any recital to be found in the jury waiver. In these rulings, made in the first trial, Judge Dusher followed the settled practice of Illinois. *People* v. *Meyering*, 352 Ill. 314; *People* v. *Bush*, 300 Ill. 532; *People* v. *Stubblefield*, 391 Ill. 609; *People* v. *Braner*, 389 Ill. 190. Where the clerk copies into the record a paper filed with him, such as the jury waiver in this case, this paper should be disregarded as not properly in the record. *People* v. *Tielke*, 259 Ill. 88, 98; *People* v. *Lidner*, 262 Ill. 223; *People* v. *Ellsworth*, 261 Ill. 275; *People* v. *Weston*, 236 Ill. 104; *Earll* v. *People*, 73 Ill. 329; *U. P. Rw. Co.* v. *R. I. & P. Ry. Co.*, 164 Ill. 88, 109; *People* v. *Nall*, 242 Ill. 284. The minutes of the trial judge are no part of the record. *Sattler* v. *People*, 59 Ill. 68. There is no showing that Marino was present when this paper was filed. Presence is required, *People* v. *McGrane*, 336 Ill. 404.

In the second trial of the habeas corpus, settled rules of law were disregarded. Judge Dusher stated, in his opinion, that since he tried the first habeas corpus case, the Illinois Supreme Court had handed down its decision in *People* v. *Nierstheimer,* 396 Ill. 193, 197, 71 N.E. 2nd 62. Judge Dusher held that the *Nierstheimer case* gave the trial court the right to supplement the common law record.

An ambiguity existed in the judgment in the *Nierstheimer case* and the court said that, "—the entire record will be searched and interpreted and a deficiency in one place will be cured by what appears in another." The judge's minutes merely confirmed the interpretation adopted by the court. In the case at bar there exists no ambiguity. There is no plea. If the entire record be searched,—there is still no plea. The jury waiver and the judge's notes are not part of the record.

If the *Nierstheimer case* did support the second finding of the trial judge, we submit that it was not within the power of the state courts to change the law. That is, to make any new law in order to upset a finding previously made here in 332 U.S. 561, under the established practice as it existed at the time of the decision here.

Our Supreme Court, in No. 30804, had before it a record without a plea. When 332 U.S. 561 was decided, this record had not been reviewed by our high court. If, after his murder conviction, Marino had never gone back to the trial court, and had never sought the first trial on habeas corpus before Judge Dusher, Marino would have been entitled to a reversal in No. 30804. No motion was ever made, at any time, in any court, to correct the original record. As long as that record stands, it will show that no plea was in fact entered. In 332 U.S. 561 Marino brought here the transcript of the record made at the time of his conviction. Your Honors found that the record

contained no plea. Since that time a transcript of the same record has been looked over by the trial judge and sent by the clerk of the trial court to the Supreme Court of Illinois. Still there is no plea. The same transcript, as abstracted, without a plea, is here again presented to Your Honors with this petition. When our Supreme Court affirmed the judgment in No. 30804 without a plea, it denied to Marino the equal protection of the laws and thereby denied due process as guaranteed by the Fourteenth Amendment. Also, we repeat that at the same time, the Illinois Supreme Court erred in not accepting the finding made here in 332 U.S. 561 that there had been no plea.

Before the prosecution is permitted to fill out the common law record, and supply a defect, from papers on file, and from the notes made by the judge, Your Honors will, no doubt, keep in mind the large number of prisoners who have been defeated by application of the settled rule. We should not have one rule for the prosecution and another for the defense.

The rule here is that on reversal of a judgment, order or decree, a dependent order, or proceeding, ancillary and accessory thereto shares its fate and falls with it. *Butler* v. *Eaton,* 141 U.S. 240; *Chicago etc. R. Co.* v. *Fosdick,* 106 U.S. 47. We submit that, the issue being in the habeas corpus case whether or not the murder conviction could stand, that, the decision in 332 U.S. 561 should result in the fall of the judgment in the murder case No. 30804. Particularly should this rule apply in the matter of the plea. The defect is in the record.

Under the law of Illinois, a trial court is without jurisdiction in the absence of a plea. *Yundt* v. *People,* 65 Ill. 372; *People* v. *Schoffer,* 400 Ill. 174. The statute provides for certain procedural safeguards in the matter of a plea of guilty. *People* v. *Fulimon,* 308 Ill. 235, 237; *People* v.

Throop, 359 Ill. 354, 359. In No. 30804 we assigned as error, No. 3, Abst. 6, that no plea was of record. All errors assigned were alleged to violate due process as guaranteed by the federal constitution, No. 16, Abst. 7. The Illinois Supreme Court considered all errors assigned in the light of this claim that federal rights had been denied. The answer given by the Illinois Supreme Court was an erroneous one, *i.e.*, that our point had been decided against us when Your Honors denied certiorari in Misc. 30.

We again quote from the opinion in No. 30804, 404 Ill. 37, 41:

> "Defendant makes the contentions, among others, that the record does not show he pleaded to the indictment and that, in the absence of a plea, the circuit court was without jurisdiction to enter a judgment of conviction; that the statute was not complied with as to a plea of guilty; that the facts and the law have been adjudicated, and that he has been denied due process guaranteed by the fourteenth amendment to the Federal Constitution."

We fail to find anywhere in the opinion what should be done about these contentions. That is, there has been no decision upon our points, unless it be found in the general statement concerning the denial of certiorari in Misc. 30, as follows, 404 Ill. 37, 41:

> "We are of the opinion that this decision of the Supreme Court of the United States renders the principal issues made and argued in the present proceeding *res judicata.*"

As we have said, Your Honors, in 332 U.S. 561, found that no plea had been entered. We submit that the Illinois Supreme Court erred in not coming to the same conclusion. Not only because it was bound by the finding here in 332 U.S. 561, but because of the fact.

Although it was not within the power of Judge Dusher

to change the record of the original judgment, in order to make a case materially different from that presented in 332 U.S. 561, *Hickman* v. *Fort Scott*, 141 U.S. 415, Judge Dusher, upon retrial did make a contrary finding, and concluded that a proper plea had been made. Your Honors then denied certiorari. The Illinois Supreme Court evidently took this denial to mean that Your Honors affirmed the second finding by Judge Dusher. The Illinois Supreme Court held that the matter was no longer open, when Marino reached that Court. The fallacy here is that denial of certiorari did not mean affirmance of Judge Dusher. We submit that the Illinois Supreme Court should have examined the record to see if Judge Dusher had a right to contradict the finding of fact made here in 332 U.S. 561. Further, if the Illinois Supreme Court believed that Judge Dusher had a right to reopen the question, the Illinois Supreme Court should have determined, from the record if Judge Dusher had been warranted in finding that Marino had entered a plea.

When we requested the Illinois Supreme Court to look at the record and to determine if Judge Dusher had obeyed the mandate, Mr. Justice Wilson said, 404 Ill. 37, 41:

> "To the extent that defendant seeks a construction of the remanding order of the Supreme Court of the United States, we respectfully decline the invitation to construe."

We submit that it was impossible for the Illinois Supreme Court to ascertain if Judge Dusher had obeyed the mandate of this Court, without some understanding, upon the part of the Illinois Supreme Court, of the meaning of the mandate. It is well settled that the opinion of this Court is a part of the mandate. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256.

The two opinions rendered by the Illinois Supreme Court

seem to be inconsistent. Judge Fulton, in No. 30854, as we have said, erroneously assumes that Your Honors had only the common law record. On the other hand, when we pointed out a defect in that record, Judge Wilson in No. 30804, announced that Your Honors had more than the common law record. If we are correct in our understanding of the two opinions, the Illinois Supreme Court has chosen to view the decision, made here in 332 U.S. 561, first one way and then in another way,—depending upon which case was up for decision, the writ of error or the habeas corpus case.

Now may we request Your Honors to look at all of the records, papers and proceedings to determine if there has even been a plea in this case. We say there has not. Your Honors found in 332 U.S. 561, 562 that:

> "The waiver was not in fact signed by him, and no plea of guilty was ever entered at the trial."

Our contention is that that should have been the end of that litigation between the parties. Since the facts had been stipulated and this court had passed on the issues which control the litigation, we take it that there was nothing more to be decided. *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 73; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620.

The Illinois Supreme Court has said that the new evidence is conclusive. If Your Honors see fit to look behind that conclusion and to examine the new evidence, permit us to cast a few doubts. Your Honors will wonder why the authorities did not bring in a handwriting expert, or at least some one to show that Marino could write. A photostatic of the jury waiver is to be found in the certificate of evidence. R. 37. Casual inspection will lead anyone to believe that the signature is in the hand of the person who filled out the blank. The person who wrote the title of the case. No immigrant could write in such

manner. The record shows that in the first trial Marino testified, R. 243, Abst. 12, that he did not sign, nor did he authorize anyone to sign for him. He was unable to read, write or understand English at that time. R. 243, Abst. 12. Torrisi, the policeman, testified in that trial, R. 252, Abst. 14, but he said nothing of the jury waiver. In the second trial he said he saw Marino sign, R. 150, Abst. 8. The former States Attorney also said he saw Marino sign, R. 174, Abst. 10. No effort was made to show why this evidence was not produced in the first trial. It is our contention that the subject was not open for a second investigation. The importance of a correct decision on this matter is seen when it is remembered that this jury waiver contained a plea of guilty.

The decision of the reviewing court becomes the law of the case as to all matters properly within the scope thereof, and controls all subsequent trials and proceedings, 5 C.J.S., Appeal and Error, Section 1964, page 1499. *Truax* v. *Corrigan*, 257 U.S. 312, 324. *Packard* v. *Davis*, 33 U.S. 310. In the case at bar, the reviewing court was this court in 332 U.S. 561. It has been held, in a number of cases, including *In re Sanford Fork and Tool Co. Petitioner*, 160 U.S. 247; *Stanley* v. *Swalby*, 162 U.S. 255, that no fact can be later established in contradiction of those found. See note on conclusiveness of prior decisions on subsequent appeals in 34 L.R.A. 321. As to questions which might have been, but were not, raised on prior appeal, see 1 A.L.R. 725. On a subsequent review of the same case, the court will take judicial notice of the records in the former review, so as to determine the identity of questions presented. *Greenberg* v. *City of Chicago*, 256 Ill. 213, *Jackson* v. *Glos*, 249 Ill. 388; *Newberry* v. *Blatchford*, 106 Ill. 584; The *Greenberg case*, page 220, cites, among others, *Beloit* v. *Morgan*, 7 Wall. 619. The courts of the United States can,

without question, revise the proceedings of the state judicial tribunals, and may declare them to be of no legal validity. *Martin* v. *Hunter,* 14 U.S. 304, 343. The state courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. *Davis* v. *Mechsler,* 263 U.S. 22, 24. Upon the state courts equally with the federal courts rests the obligation to enforce the Fourteenth Amendment. *Ex parte Royall,* 117 U.S. 24, 248.

The Right of Counsel.

The constitutional right of a person accused of crime to have the assistance of counsel has been declared so often here that we need not dwell upon the general rule. The principal authorities are cited in *Bute* v. *Illinois,* 333 U.S. 640. The authorities are reviewed in *Betts* v. *Brady,* 316 U.S. 455, where it is said, in discussing the application of the due process clause to state criminal proceedings, that asserted denial of due process is to be tested by the appraisal of all facts in the case. We welcome such a test, applied to the entire record, because we believe we present a situation in which there has been a denial of fundamental fairness, shocking to the universal sense of justice.

Courts indulge every reasonable presumption against waiver of fundamental rights and we do not presume acquiescence in the loss of fundamental rights. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, from which we quote,

> "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In the case at bar Your Honors have already determined, in 332 U.S. 561, that due process has been denied.

We submit that Judge Dusher made a new finding to the effect that Marino had been advised of his rights, and knew exactly what he was doing, upon rather flimsy grounds. Judge Dusher indulged in a presumption from the fact that a lawyer may have visited Marino in the jail before indictment that Marino received complete and full advice in the matter of pleading guilty. This is a rather violent presumption. The indictment had not been returned at the time of the alleged visit, so it would have been impossible to advise Marino on that subject.

This lawyer found difficulty in securing the employment and eventually failed. Our guess is as good as was that of the trial judge as to what may have been discussed in these talks, if any were held. The importance of the assistance of counsel on any material step is too large to permit speculation. *Hawk* v. *Olson*, 326 U.S. 271, 278; *Thomas* v. *Hunter*, 153 F 2nd 834. If we were to speculate upon what the lawyer talked about to Marino, before the lawyer had completed his financial arrangements, we would say that it was not about a plea of guilty. Lawyers do not start talking about pleading guilty, before they get their money and before indictment. "* * * there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana*, 338 U.S. 49, 52.

See note on effect of parties changing testimony on second trial, to supply defects in the case made on the first trial. 37 LRA (N.S.) 429.

Your Honors will note that although Marino and the policeman gave conflicting versions of that which had transpired in the murder case, Marino testified substantially to the same facts each time. R. 12, 241, Abst. 2, 12. On the other hand, if we compare the testimony given by the policeman in the first trial, R. 252, Abst. 14, with that given by him in the second, R. 146, Abst. 7, we find that in the

second trial the policeman has given testimony new to the case. It is upon this new testimony that the judge has made findings in contradiction to those adjudicated in 332 U.S. 561. Facts found by way of inference or deduction from subordinate or established facts are not conclusive on the appellate court. 5 C.J.S. Sec. 1656, p. 698. *Brown* v. *United States*, 95 F. 2nd. 487. The Illinois Supreme Court erred in not applying this rule. *Fichter* v. *Milk Wagon Drivers Union*, 382 Ill. 91, 100. If Your Honors ever get to the task of estimating the credibility of Torrisi, it will be noticed that after Your Honors found in 332 U.S. 561, that he had acted as interpreter, Torrisi testified in the second trial, R. 154, Abst. 8, that he had not so acted. We note from the certificate of evidence, R. 23, that Torrisi also was sworn as an interpreter at the preliminary hearing.

Torrisi satisfied Judge Dusher, in the second hearing, that Judge Reynolds talked with Marino in the murder case, through an interpreter on the day before the sentence, and explained fully the consequences of a plea of guilty, as required by the statute.

The Illinois Supreme Court has said that these new findings were upon conclusive evidence. As is shown by the certificate of evidence, Torrisi was on the stand in the hearing conducted by Judge Reynolds on mitigation or aggravation. This occurred on the day following the alleged plea of guilty. We quote, R. 87:

> "The Court. Q: Does the defendant speak and understand English?
> Torrisi A: Hardly any."

If Judge Reynolds had gone through the proceeding testified to by Torrisi the day before, and had talked to Marino through an interpreter, Judge Reynolds would not have had to ask if Marino could talk English.

In the hearing on mitigation and aggravation R. pp's 65

to 130 the court examined the following witnesses—the policeman, the doctor who examined the body, and the stenographer who took the confession. Also a psychiatrist, R. 117, who said, R. 123, that Marino was of the mental age of 10, 11 or 12 years. That it had taken Marino ten years to get into the fourth grade in Italy.

The defendant was not called upon to testify nor were any witnesses produced for him. No one questioned the witnesses for him. Not a word seems to have been said in his behalf. This case is of the type referred to in *Betts* v. *Brady*, as lacking in fundamental fairness, because neither counsel, nor adequate judicial guidance or protection, was furnished at the trial. *Gibbs* v. *Burke*, 337 U.S. 773, 781. It appears that the doctor was called in after the proceedings had been commenced. A question of capacity must have arisen. Surely Judge Reynolds should have realized that Marino stood in great need of counsel.

In *Uveges* v. *Pennsylvania*, 335 U.S. 437, Mr. Justice Reed, after noting that there existed a difference of opinion among Your Honors, had this to say:

> "Under either view of the requirements of due process, the facts in this case require the presence of counsel at the petitioner's trial. He should not have been permitted to plead 'Guilty' without an offer of the advice of counsel in this situation."

Your Honors have made it clear that the Fourteenth Amendment enjoins upon the states a rule governing the matter of counsel for prisoners. It has been said that this rule differs, both from the Illinois law, *People* v. *Lavendowski*, 336 Ill. 173, and from the federal law, applicable in Federal Courts, *Foster* v. *Illinois*, 332 U.S. 134. We believe that a study of the cases will demonstrate that in spite of any differences, on matters not here involved, the case at

bar demonstrates lack of due process. There appears to be no difference of opinion as to the following:

In capital cases, of which this is one, the State Courts are bound to appoint counsel, unless the accused knowingly and understandingly waives the right to counsel. *Carter* v. *Illinois*, 329 U.S. 173 affirming *People* v. *Carter*, 391 Ill. 594; *Foster* v. *Illinois*, 332 U.S. 134; *Bute* v. *Illinois*, 333 U.S. 640; *DeMeerleer* v. *Michigan*, 329 U.S. 173; *Powell* v. *Alabama*, 287 U.S. 45; *Betts* v. *Brady*, 316 U.S. 455.

There can be no controversy among the members of this court, and no difference between the view held by this court and the Illinois courts, if we contend for the following:

When a boy under indictment for murder is brought before the court, without counsel, and it appears that he is of low grade mentality, unfamiliar with our language and court procedure, the trial court is under a duty to make certain that he understands his constitutional rights and that he has an opportunity to avail himself of them. No effort having been made to discharge that duty, and his need for counsel being obvious, a sentence to life imprisonment, inflicted in the absence of a plea, upon an uncounseled defendant, not knowing or understanding what has happened, must lack due process.

The facts conceded by the state, and found to exist by Your Honors are set out in 332 U.S. 561, 562.

The error of the trial court, on the second hearing, is shown by the following quotation from the opinion of Judge Dusher, R. 275:

> "Under the law of Illinois, it seems to me that before a defendant in a criminal case can raise the question of whether or not he was represented by an attorney and had the benefit of the advice of counsel, he must appear before the court and ask for the appointment of a lawyer or state the facts to the court that would

indicate that he was indigent and could not employ a lawyer."

The complete answer to this is that Marino had raised the question and Your Honors had decided it. The decision in 332 U.S. 561 was binding on Judge Dusher and the Illinois Supreme Court erred in not so holding. It was beside the point for Judge Dusher to discuss any difference he may have perceived between the law of Illinois and the Federal government. Your Honors had decided the matter by virtue of the Fourteenth Amendment. Of course it was too late to question the jurisdiction of this Court, the manner in which the question was raised, or the evidence upon which the conclusions of fact were made, or the soundness of the law declared.

Your Honors made a study of the requirements of the Illinois law in *Bute* v. *Illinois*, 333 U.S. 640, 654 and we venture to say that due process as guaranteed by Illinois was violated in the conviction of Marino. But Your Honors need not decide that question and Judge Dusher should not have been concerned with it. The due process clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires. *Herbert* v. *Louisiana*, 272 U.S. 312, 316-317.

In the *People* v. *Superior Court*, 234 Ill. 186, 84 N.E. 875, 14 Ann. Cas. 173 a convict petitioned the Superior Court of Cook County for a writ of habeas corpus. Before the case in the trial court could be reached for hearing, the Attorney General filed, in the Supreme Court of Illinois, his petition for the writ of certiorari. The Supreme Court of Illinois ordered that the record before the trial court be quashed and that the prisoner be returned to the warden.

Concerning a question which had not, but should have, been presented to the Supreme Court of Illinois, that Court said, p. 199:

"That question had already been determined by a tribunal finding whose finding the Superior Court had no authority to review. Superior Court was, therefore, without jurisdiction in the premises and without right or power to order the issuance of the writ."

Your Honors had held in 332 U.S. 561 that the judgment against Marino had been in violation of those rights guaranteed him by the Constitution. When Judge Dusher undertook to re-examine the matter, Judge Dusher overlooked the proposition that that question had already been determined by a tribunal whose finding he had no authority to review. We submit that, when this situation was presented to the Illinois Supreme Court, that that Court should have applied the principle announced in the above case of *People* v. *Superior Court.* The Illinois Supreme Court erred in not holding that the facts and the law had been adjudicated here. Judge Dusher had no jurisdiction, except to apply the facts and law so adjudicated, to the case.

There are a number of cases wherein the Illinois Supreme Court has, by mandamus, expunged orders entered in habeas corpus, in the trial courts. *People* v. *Shurtleff*, 335 Ill. 210, 189 N.E. 291; *People* v. *Kelly*, 352 Ill. 567, 186 N.E. 188. We do not expect Your Honors to consider a complaint that the Illinois Supreme Court should have entertained our petition for mandamus. We know that Your Honors are not concerned in the local problems of procedure. We merely point to the undoubted supervisory power of the Illinois Supreme Court. cf *People* v. *Graper*, 397 Ill. 522. It is our contention that when the Illinois Supreme Court issued the writ, in No. 30854, it assumed jurisdiction. It follows that Your Honors have the power of review because federal questions were involved before the Illinois Supreme Court and decided adversly to Marino—in conflict with 332 U.S. 561.

The Grand Jury.

We repeat a contention made to the Illinois Supreme Court, with the realization that the adverse finding may very well be accepted here, as supportable upon local law. It seems worth repeating, however, as our point helps to show the need Marino had for counsel in the murder case. The Illinois Supreme Court has decided this point against him because Marino did not move to quash the indictment. Of course, he knew nothing about court procedure.

In *R.R. Comm'n* v. *Pacific Gas Co.*, 302 U.S. 388, it was held that, having acquired jurisdiction by virtue of federal questions, the District Court may determine all questions in the case, local as well as federal. The jurisdiction of this Court is the same, over state courts as over federal courts. A State has control of the procedure in its courts, but cannot deprive citizens of fundamental rights. *Brown* v. *New Jersey*, 175 U.S. 175; *West* v. *Louisiana*, 194 U.S. 258.

The general nature of our complaint about the grand jury might be learned from the opinion of the Illinois Supreme Court in No. 30804, 404 Ill. 37. These eight bystanders, or whoever they were, referred to, might be designated as unauthorized persons. The effect of the presence of such persons is discussed in *Munson* v. *People*, 319 Ill. 596, and in *People* v. *Gould*, 345 Ill. 288; and *People* v. *Jordan*, 292 Ill. 514.

Objections made to the manner in which the Grand Jury has been organized and conducted have been made in many cases, including *People* v. *Lieber*, 357 Ill. 423; *Marsh* v. *People*, 226 Ill. 464; *People* v. *Green*, 329 Ill. 576; *Beasley* v. *People*, 89 Ill. 571; *Gillespie* v. *People*, 176 Ill. 238; *People* v. *Bain*, 358 Ill. 178; *People* v. *Munday*, 293 Ill. 191; *People* v. *Hartenbower*, 283 Ill. 591; and *People* v. *Strauch*,

247 Ill. 220. In *People* v. *Cohen*, 357 Ill. 198, the *Gillespie case*, and in *Barron* v. *People*, 73 Ill. 256 a disqualification of a Grand Jury is claimed.

Here we presented to the Illinois Supreme Court a combination of defects to the extent that there had been no Grand Jury at all. If the illegal members are subtracted, no quorum remained. Ch. 78, Sec. 16 Ill. Rev. Stat. 1949. Cases are not in point which hold that a substantial compliance with the law will suffice.

We brought our case within the scope of the expression to be found in *People* v. *Lieber*, 357 Ill. 423, 437, "other matters which might have caused a true bill to be improperly returned."

If it be held that the Grand Jury was illegal and the indictment void, there has been a lack of due process as guaranteed by the Illinois Constitution and laws, as well as that guaranteed by the Fourteenth Amendment. This point about the Grand Jury had not been raised in the habeas corpus proceedings before Judge Dusher.

The Supreme Court of Illinois has drawn certain conclusions from uncontroverted happenings. This Court is not bound by such conclusions. *Watts* v. *Indiana*, 338 U.S. 49, 51.

Conclusion

Your Honors will note from the transcript, R. 257 that upon the first habeas corpus trial, when Judge Dusher learned of the circumstances, Judge Dusher continued the matter, in order to afford the Parole Board a chance to do something to relieve Marino of the unending sentence. The Parole Board refused to act. Upon the second hearing Judge Dusher allowed the confession into evidence, R. 182 over the objection of Marino. Judge Dusher said he permitted the State to show the guilt of Marino in order to

affect his credibility. R. 276. In the first trial R. 249, Abst. 13 the court ruled that the question of whether Marino committed the crime was not involved. The outstanding facts showing lack of due process, such as age, mentality, absence of counsel, etc. did not depend upon the credibility of Marino. The confession is now before this Court, together with the claim made by Marino that he had been tortured and abused, and that he did not understand what they were doing in the office of the State's Attorney, R. 15, Abst. 2, Cf *Watts* v. *Indiana*, 338 U.S. 49. Your Honors now have access to some evidence as to the nature of the crime. Judge Reynolds sentenced this boy to life imprisonment. If the confession be taken as true, and if we believe all of the police testimony, and if we accept the case for the State, as given in the original murder trial, R. 61, Abst. 5, we now learn that Marino shot an old man on the street. The old man was not known to Marino. The boy believed that some harm was about to come to him from the old man. The fact that Marino's judgment may have been poor is explained by the testimony of the psychiatrist before Judge Reynolds, R. 117. The doctor said that Marino at the age of 18 was of low grade mentality. It is not incumbent on petitioner to prove that a lawyer could have accomplished something. The law should be the same, whether Marino be guilty or not guilty. However, it is apparent that a lawyer could have accomplished a great deal. He might have fought the case before a jury. Who is to say he could not have won? In *Von Moltke* v. *Gillies*, 332 U.S. 708, 720 Your Honors noted that a lawyer might have rendered invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty. The prosecution possessed nothing, connecting Marino with the shooting except the confession. A lawyer may very well have pre-

vented its use. We can be certain that Marino did not understand what was going on.

The Parole Board refused to temper the sentence with mercy, no doubt, because the matter was pending in the courts. The Illinois Supreme Court refused relief under the misapprehension that the matter had been conclusively settled here. Meanwhile Marino is in the penitentiary.

The record shows that Marino has learned our language. No doubt his teachers in the penitentiary endeavored to also teach the advantages of democracy and the value of our Constitution. It surely must be difficult to reconcile the course of action here, so far, with the observance and preservation of Constitutional rights.

We submit that this case presents an example of the denial of rights to the ignorant and indigent who are unable to employ counsel and do not know their rights. This is a denial of the equal protection of the laws.

At the conclusion of the confession of error, filed in 1947, the Attorney General "consented that the judgment be reversed without further briefs, arguments or proceedings, as soon as possible, in order to correct a very evident failure of due process in petitioners original trial." Although Your Honors held the judgment to be void, two years have passed and Marino is still in the penitentiary.

We notice in *United States* v. *Urberteit*, 336 U.S. 804, where the question presented was whether the mandate of this Court had been followed, Your Honors apparently determined, from the petition for the certiorari, that it had not, and reversed the judgment without the necessity of further proceedings here. In No. 199 decided Monday, October 10, 1949 *Walsh* v. *United States ex rel White* Your Honors reversed the Court of Appeals and remanded the case to the trial court with directions to discharge the

writ of habeas corpus and to remand White to custody. This order apparently was entered after consideration of only the petition for certiorari.

Of course Your Honors know best as to the proper disposition to be made. On reversing the judgments below, this Court may render or direct final judgment in the cause, if the circumstances warrant such action. *City of Ft. Scott* v. *Hickman*, 112 U.S. 150; *Retzer* v. *Wood*, 109 U.S. 185; *Germania Fire Insurance Co.* v. *Boykin*, 12 Wall 433.

If this Court should see fit to reverse the Illinois Supreme Court, with directions, we note that it has been held that, where a case is here reversed on a Federal question, and remanded to the highest state court, for further proceedings by the lower court to be in conformity with the opinion of this court, as the matter involved is a Federal question within the protection of this court. *Schlemmer* v. *Buffalo etc. Ry. Co.*, 220 U.S. 590.

Marino seeks the protection of this Court and we pray for such action as may be proper and just.

Respectfully submitted,

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